

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

| | | |
|---------------------------------|---|-------------------------------|
| UNITED STATES OF AMERICA |) | |
| |) | |
| v. |) | Criminal No. 91-52-P-H |
| |) | (Civil No. 95-280-P-H) |
| CLIFFORD A. DOYLE, |) | |
| |) | |
| Defendant |) | |

**RECOMMENDED DECISION ON DEFENDANT’S MOTION
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

Clifford A. Doyle moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Doyle suffered a criminal forfeiture of property used in and derived from the proceeds of his cocaine possession and distribution. He was also sentenced to a prison term of thirteen months for income tax offenses, and thirteen years for distribution of and possession with intent to distribute cocaine. Doyle argues that his prison sentence on the drug offense violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Because this motion constitutes abuse of the writ, I recommend that the motion be denied without a hearing.

I. Background

On September 9, 1991 Doyle pled guilty to a criminal forfeiture charge concerning property used in the commission of, and derived from the proceeds of, his cocaine possession and distribution. Transcript of Proceedings on Sept. 9, 1991, *United States v. Doyle*, Crim. No. 91-52-P-H, at 6. At the same proceeding he pled guilty to distribution of and possession with intent to distribute cocaine, income tax evasion and making a false tax return. *Id.* at 6-7. The court entered judgment on the

criminal forfeiture charge on September 10, 1991. Judgment (Crim. No. 91-34-P-H, Docket No. 2). On April 6, 1992 the court sentenced Doyle to imprisonment for thirteen months on the income tax charges and thirteen years on the cocaine charge. Judgment (Crim. No. 91-52-P-H, Docket No. 14) at 2.

On direct appeal in Crim. No. 91-52-P-H, Doyle argued that the district court erroneously denied his motion to withdraw his guilty plea. *United States v. Doyle*, 981 F.2d 591 (1st Cir. 1992). The First Circuit affirmed the conviction. *Id.* On April 8, 1994 Doyle filed, pro se, his first section 2255 motion. Motion Under 28 USC § 2255 (Crim. No. 91-52-P-H, Docket No. 25). That motion did not raise a double jeopardy claim. This court denied the motion on May 3, 1994, Order (Crim. No. 91-52-P-H, Docket No. 27), and the denial was affirmed on appeal, *United States v. Doyle*, 46 F.3d 1114 (1st Cir. 1995) (table). In his present section 2255 motion, Doyle argues for the first time that imposing both a criminal forfeiture and a prison sentence for the same conduct, his cocaine possession and distribution, violates the Double Jeopardy Clause.

II. Abuse of the Writ

“The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus.” *McCleskey v. Zant*, 499 U.S. 467, 470 (1991).¹ The government bears the initial burden of pleading abuse of the writ. *Id.* at 494. The government has satisfied that burden by detailing Doyle’s prior writ history, identifying the claim that appears for the first time, and alleging that Doyle has

¹ The standard announced in *McCleskey*, a section 2254 case, is equally applicable to section 2255 proceedings. *Andiarena v. United States*, 967 F.2d 715, 717 (1st Cir. 1992).

abused the writ. The burden now shifts to Doyle to disprove abuse of the writ.

To satisfy his burden, Doyle must show cause for failing to raise his double jeopardy claim in his first section 2255 motion, as well as prejudice resulting from that failure. *Id.* at 493-94. Alternatively, his “failure to raise the claim in an earlier petition may nonetheless be excused if he . . . can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.” *Id.* at 494-95.

“To show cause, [Doyle] must show that some external impediment, such as governmental interference or the reasonable unavailability of the factual or legal basis for a claim, prevented the claim from being raised earlier.” *Whittemore v. United States*, 986 F.2d 575, 578 (1st Cir. 1993) (citing *McCleskey*, 499 U.S. at 497). Doyle’s only “cause” argument is that he was forced to file his original section 2255 motion pro se, and had no idea that a double jeopardy issue existed. The First Circuit rejected just such an argument in *Whittemore*, characterizing it as “a straightforward claim which [the petitioner] could have presented at the time of his first petition, even though he did not have the funds to hire counsel and even though he was unfamiliar with the law.” *Id.* at 579. One’s pro se status is not an “objective factor external to his defense,” and thus cannot constitute cause. *Id.*

Doyle also argues that refusing to entertain his motion would constitute a fundamental miscarriage of justice. This narrow exception applies only in “extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime.” *McCleskey*, 499 U.S. at 494. It is not enough for Doyle to argue that he should not have been sentenced for the crime. *Id.* at 502 (in § 2254 case, fundamental-miscarriage-of-justice exception inapplicable because petitioner could not demonstrate his innocence); see *Burks v. Dubois*, 55 F.3d

712, 717 (1st Cir. 1995) (in § 2254 case, fundamental-miscarriage-of-justice exception is “explicitly tied to a showing of actual innocence”); *see also* *Wallace v. Lockhart*, 12 F.3d 823, 826-27 (8th Cir. 1994) (double jeopardy claim, without claim of actual innocence, fails to satisfy the fundamental-miscarriage-of-justice exception in § 2254 proceeding); *Steele v. Young*, 11 F.3d 1518, 1522 (10th Cir. 1993) (same). Doyle does not claim that he is actually innocent of the cocaine offense. Accordingly, I recommend that his motion be ***DENIED*** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 30th day of January, 1996.

David M. Cohen
United States Magistrate Judge